

369496/17868

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

HARRY L. SAMUEL,)	
)	
Plaintiff,)	C.A. No. 05-037- SLR
)	JURY OF 12 DEMANDED
v.)	
)	
THOMAS CARROLL, et al.,)	
)	
Defendants.)	

NOTICE OF MOTION

Rodger Dallery Smith, II
Morris, Nichols, Arsht & Tunnell LLP
1201 North Market Street
P.O. Box 1347
Wilmington, DE 19899

Dr. Tammy Kastre
First Correctional Medical
205 W. Giaconda Way, Suite 115
Tucson, AZ 85704

PLEASE TAKE NOTICE that the attached Motion will be presented to the Court at the convenience of the Court.

Heckler & Frabizzio, P.A.

/s/Daniel L. McKenty
Daniel L. McKenty, *DE Bar No. 2689*
800 Delaware Avenue, Suite 200
PO BOX 128
Wilmington, DE 19899
Attorney for Defendant

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THOMAS CARROLL, et al.,)	
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Defendants.)	

RULE 7.1.1 STATEMENT

Pursuant to Delaware District Court Local Rule 7.1.1, undersigned counsel has made a reasonable effort to reach an agreement with the opposing attorney on the matters set forth in this motion.

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Defendants.)	

MOTION TO WITHDRAW

Pursuant to the Delaware Lawyers' Rules of Professional Conduct 1.16 (b)(5),(6), and Rule 83.7 of the Local Rules for the District of Delaware, the undersigned attorneys hereby request leave to withdraw as defense counsel for First Correctional Medical Inc., et al in the above captioned matter for the following reasons:

1. First Correctional Medical - Delaware, LLC contracted with the State of Delaware to provide health care to the Delaware Department of Correction from July 1, 2002 through June 30, 2005.

2. From July 1, 2002 through June 30, 2005, First Correctional Medical - Delaware, LLC, and its employees were insured for professional liability by Chubb Group of Insurance Companies.

3. Chubb Group of Insurance Companies retained McCullough & McKenty, P.A.,¹ Daniel L. McKenty, Esquire, Steven F. Mones, Esquire, and Dana Spring Monzo², Esquire

¹ McCullough & McKenty has dissolved. Mr. McKenty has moved to Heckler & Frabizzio P.A. and Substitutions of Counsel have been filed.

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(formerly Dana M. Spring, Esquire), to provide medical malpractice and 42 U.S.C. § 1983 defense coverage for First Correctional Medical - Delaware, LLC, and its various employees.

4. After the termination of its health care contract with the Delaware Department of Correction, First Correctional Medical - Delaware, LLC ceased operations in the State of Delaware. Although no formal dissolution papers were filed with the State of Delaware, it is the understanding of the undersigned defense counsel that First Correctional Medical - Delaware, LLC, has no assets

5. For all claims arising on or after July 1, 2005, First Correctional Medical - Delaware, LLC, elected to proceed as a self-insured entity. McCullough & McKenty, Mr. McKenty, and Ms. Monzo remained counsel for First Correctional Medical - Delaware, LLC, and its employees.

6. First Correctional Medical Inc., the Arizona-based parent company of First Correctional Medical - Delaware, LLC, funded the defense of lawsuits against First Correctional Medical and its various employees after July 1, 2005.

7. In October 2006, the undersigned defense counsel for First Correctional Medical - Delaware, LLC, was made aware that First Correctional Medical, Inc., was experiencing severe financial difficulties and could not meet its financial obligations with respect to defense and indemnity costs of lawsuits pending in the State and/or District of Delaware. At that time, First Correctional Medical, Inc., was several months behind on its payments of legal fees to McCullough & McKenty, P.A.

² Mr. Mones and Ms. Spring are longer affiliated with McCullough and McKenty P.A. nor with Heckler & Frabizzio.

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8. After lengthy conversations and correspondence with Tammy Kastre, M.D. (CEO of First Correctional Medical, Inc.), Michael Johnson (CFO of First Correctional Medical, Inc.), Todd Jackson, Esquire (Arizona Corporate Counsel for First Correctional Medical, Inc.), and Jonathan Rothschild, Esquire (Arizona Financial Counsel for First Correctional Medical, Inc.), McCullough & McKenty, P.A., agreed to continue to represent First Correctional Medical - Delaware, LLC, and its employees, with the understanding that McCullough & McKenty's legal fees would be brought current, a monthly budget would be put in place regarding the continued defense of First Correctional Medical lawsuits, McCullough & McKenty would be kept abreast of any changes to the viability of First Correctional Medical, Inc., and finally that failure to adhere to these requests would result in the withdrawal of McCullough & McKenty, P.A., as counsel for First Correctional Medical - Delaware, LLC, and its employees.

9. Until December 31, 2006, First Correctional Medical, Inc., did its best to bring McCullough & McKenty, P.A., current on its legal bills and actually came within \$30,000 of the monies owed.

10. Since January 1, 2007, First Correctional Medical, Inc., has not made any payments to McCullough & McKenty, P.A., despite promising a \$30,000 check for past legal services rendered and promising to establish a monthly retainer fund. In July 2007, McCullough & McKenty P.A. dissolved and Mr. McKenty moved to Heckler & Frabizzio. First Correctional Medical has not discussed its intentions with Heckler & Frabizzio. To date, Heckler & Frabizzio, continues to defend First Correctional Medical - Delaware, LLC, and its employees in over (25) twenty-five lawsuits despite being unable to contact First Correctional Medical Inc., officials and being in arrears of legal fees in excess of **\$50,253.55** owed to McCullough & McKenty and **\$17,672.00** owed to Heckler & Frabizzio.

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11. The undersigned defense counsel has not only attempted to contact officials from First Correctional Medical, Inc, regarding its outstanding fees, but the undersigned counsel has also made numerous attempts to contact officials from First Correctional Medical, Inc., regarding various litigation strategies and the funding of expert fees in defensible cases quickly approaching trial. First Correctional Medical Inc.'s officials have responded to Court Ordered participation in mediation and Court Ordered response to Discovery. Those officials have not discussed their strategy for resolving these cases

12. The undersigned counsel request permission to withdraw as counsel for First Correctional Medical because First Correctional Medical, Inc., has substantially failed to meet its financial obligations to McCullough & McKenty, P.A., and to Heckler & Frabizzio, P.A., and Heckler & Frabizzio cannot sustain the financial burden of funding First Correctional Medical Inc.'s legal defense in the State/District of Delaware. Furthermore, First Correctional Medical cannot be reached for guidance regarding legal strategies and general defense of its cases.

13. Because First Correctional Medical, Inc., is no longer funding the defense of its former employees in lawsuits in the State of Delaware, the former employees may be in a position adverse to First Correctional Medical, Inc. The undersigned counsel submit that they cannot continue the representation of the individually named employees of First Correctional Medical, Inc., as a conflict of interest now exists between the parties.

14. Further, the undersigned requests this Court grant First Correctional Medical a reasonable extension of time to obtain new Counsel and respond to discovery.

15. For the abovementioned reasons, the undersigned hereby request that they be permitted to withdraw as counsel for First Correctional Medical Inc., in the above captioned matter.

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WHEREFORE, undersigned counsel requests this Court grant an Order allowing counsel to withdraw from this matter and grant First Correctional Medical a reasonable extension of time to obtain new counsel and respond to discovery.

HECKLER & FRABIZZIO

/s/Daniel L. McKenty

Daniel L. McKenty, *DE Bar No. 2689*

800 Delaware Avenue, Suite 200

Wilmington, DE 19801

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Defendants.)	

CERTIFICATE OF SERVICE

I certify that, on this 8th day of February, a copy of this Motion to Withdraw was served upon the following individuals electronically:

Rodger Dallery Smith, II
Morris, Nichols, Arsht & Tunnell LLP
1201 North Market Street
P.O. Box 1347
Wilmington, DE 19899

Dr. Tammy Kastre
First Correctional Medical
205 W. Giaconda Way, Suite 115
Tucson, AZ 85704

HECKLER & FRABIZZIO, P.A.

/s/Daniel L. McKenty
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ORDER

And now this __th day of _____, 2008, having considered *Heckler & Frabizzio, P.A., Daniel L. McKenty, Esquire's, Motion to Withdraw* and any opposition thereto,

It is HEREBY ORDERED that *Heckler & Frabizzio, P.A., Daniel L. McKenty, Esquire's Motion to Withdraw* is granted.

J.